BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERRI H. ROATH Claimant	)	
VS.	)	
ASR INTERNATIONAL CORPORATION Respondent	)	Docket No. 1,032,944
AND	)	
GENERAL INS. CO. OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 6, 2007, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on February 5, 2008. Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's injuries from her fall on January 17, 2007, were compensable. Although he found both Dr. Edward Prostic and Dr. Vito Carabetta well qualified medical experts, he noted that claimant did not tell Dr. Carabetta about injuries to her right arm and therefore awarded her an 8 percent permanent partial impairment to the body as a whole based on the rating of Dr. Prostic.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant's accidental injury occurred when she slipped and fell in a parking lot. Respondent argues there is no evidence that either respondent or Pitney Bowes had control of that parking lot. Accordingly, respondent argues that claimant's accidental injury

of January 17, 2007, did not arise out of and in the course of her employment. Respondent also argues that claimant assumed a personal risk when she entered the parking lot to retrieve her purse from her car. Respondent also contends that neither Dr. Prostic nor Dr. Carabetta examined claimant's right arm or included any impairment for claimant's right arm in their respective ratings. Therefore, respondent argues that since the ALJ found both physicians to be well qualified, claimant's impairment should be deemed to be no more a split of the ratings of Dr. Prostic and Dr. Carabetta, which computes to 6.5 percent.

Claimant asserts that the parking lot involved in this case was used for Pitney Bowes employees and is located on property owned by Pitney Bowes. Further, claimant contends that the evidence showed it was standard practice of many employees to go outside to the parking lot during their breaks and that this was well known to respondent. In regard to respondent's argument that she fell while assuming a personal risk, claimant asserts that the courts in Kansas have recognized that certain personal activities are compensable in workers compensation. Claimant next argues that Dr. Prostic's rating of 8 percent permanent partial impairment to the body as a whole is more credible than the rating of Dr. Carabetta. Accordingly, claimant requests the Board affirm the ALJ's Award in its entirety.

The issues for the Board's review are:

(1) Did claimant's accidental injury arise out of and in the course of her employment with respondent?

(2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is employed by respondent as a quality clerk. Respondent has a contractual agreement with the United States Postal Service to provide quality control. In Kansas City, Kansas, respondent does business in a facility owned by Pitney Bowes. At that facility, respondent inspects Pitney Bowes' documents and equipment to be sure the handling of the mail is done correctly. None of respondent's employees are supervised by Pitney Bowes employees. Respondent and Pitney Bowes are separate entities. Respondent does not have a lease agreement on the Pitney Bowes building, other than for their employees to be there, and has no obligation to maintain those premises. The parking lot is for Pitney Bowes employees and is part of the Pitney Bowes property.

On January 17, 2007, the people working in claimant's area went on break. Claimant went out to the parking lot to retrieve her purse from her car. As she was returning to the building, she slipped and fell on some ice in the parking lot. After she fell, she felt a throbbing pain in her low back, pain and swelling in her right elbow, and pain in her neck. Claimant reported her fall to respondent. She was taken to the hospital, where

an x-ray was taken of her right elbow and arm. Claimant was told to go to her physician's office to await the results of the x-rays. The x-rays showed she had a questionable radial head fracture. She had to wear a sling and was given medication for pain and a hot and cold pack. Claimant saw Dr. Arnold Tropp, her personal physician, several times, and he released her to return to work on January 31. The work claimant performs is not strenuous, and she was able to perform her duties even though she had a injured elbow. She continues to work at respondent.

Claimant continues to have swelling in her elbow, stiffening, aching, and at times a sharp pain that runs from her elbow to her forearm. She also has achiness, stiffness, and sharp pain in her low back. In the middle of her back, she has a sharp pain that comes and goes. She also has a dull ache and some stiffness that runs from the middle of her back to her side, like muscle spasms. She has soreness and stiffness at the back of her neck. She has no numbness or tingling. She takes over-the-counter Aleve and uses a cold pack or a heat pack.

Claimant testified that it is customary for employees to go to their cars during their breaks. It is also customary for women to keep their purses in their cars, and respondent was aware of this. Claimant indicated that she leaves her purse in the trunk of her car because there is not a secure place to leave it at work. Claimant is provided a locker with a combination lock. She admitted she could have left her purse in her locker, but the lock on her locker is jammed and the locker is not secure. She admits she never told her supervisor that her locker was not secure but said she had asked someone at Pitney Bowes for another locker.

Tanya Selectman is employed by Pitney Bowes as the human relations coordinator. Respondent's employees work in the same premises. Ms. Selectman does not have responsibility for supervision of any of respondent's employees. Ms. Selectman said that personal lockers are provided to both Pitney Bowes' employees and respondent's employees to secure their personal belongings. Claimant was assigned a locker. Before January 17, 2007, claimant had not reported a problem with the combination lock on her locker, nor had she related any type of problem with the locker. Claimant never asked for another locker.

Ms. Selectman said that when employees of both Pitney Bowes and respondent go on break, employees, especially the smokers, go outside, depending on the weather. There is a break room inside the premises that can be utilized, but not for smokers. There is no requirement that employees stay inside during break time. There is a standard time for employees to take breaks, depending on the area an employee works. An area has an assigned break time, and everyone on that area goes on break at the same time. This would be true for both Pitney Bowes' and respondent's employees.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on April 13, 2007, at the request of claimant's attorney. Claimant reported to Dr. Prostic her

history of slipping and falling on ice on January 17, 2007, and that she had been diagnosed with questionable radial head fracture. However, she did not list her arm as one of the body parts Dr. Prostic was to evaluate. She denied previous difficulties with her spine or other musculoskeletal impairment. She complained of almost constant pain in the center of her low back and across her back, moving upward. She is worse with sitting, standing, bending, squatting, twisting, lifting, pushing and pulling. Claimant also complained of pain in her upper back that worsened with movements of her head and neck.

Based on Dr. Prostic's examination of claimant, he opined that she sustained injuries to multiple areas of her thoracic spine, as well as an injury to her arm, in her work-related accident of January 17, 2007. His examination, however, was strictly focused on her spinal disorders.

Using the diagnosis related estimate (DRE) model of the AMA *Guides*,[1] Dr. Prostic rated claimant as having an 8 percent permanent partial impairment to the body as a whole for her spinal disorders. He believed that claimant would need only conservative care in the future.

Dr. Vito Carabetta, who is board certified in physical medicine and rehabilitation, examined claimant on August 22, 2007, at the request of respondent. She had complaints of pain through the mid back region that went up to the upper back and down through her lower spine. She made no complaints regarding her right arm and told Dr Carabetta that her arm problems resolved some time ago. Dr. Carabetta examined claimant and diagnosed her with chronic thoracal lumbar strain.

Dr. Carabetta did not rate claimant when he first saw her, believing that there was a possibility her condition could improve. However, after receiving a request from respondent's attorney, Dr. Carabetta rated her as having a 5 percent permanent partial impairment to the body as a whole based on the DRE model of the AMA *Guides*.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] K.S.A. 2007 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 2007 Supp. 44-508(f) states in part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

Generally, injuries that occur during short breaks on the premises of the employer are considered compensable.[5] Breaks benefit both the employer and employee.[6] In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable.[7]

Larson's Workers' Compensation Law § 13.05(4) (2006) states in part:

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[4] *Id.* at 278.

[5] *See* Larson's Workers' Compensation Law § 13.05(4) (2006); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

[6] *Id.; Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005); *Vaughn v. City of Wichita*, No. 184,562, 1998 WL 100158 (Kan. WCAB Feb. 17, 1998): and *Longoria v. Wesley Rehabilitation Hospital*, No. 220,24, 1997 WL 377961 (Kan. WCAB June 9, 1997).

[7] *See* Larson's Workers' Compensation Law § 21.02 (2006); *Riley v. Graphics Systems, Inc.*, No. 237,773, 1998 WL 921346 (Kan. WCAB Dec. 31, 1998).

> The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.

Larson's Workers' Compensation Law, Ch. 21 states:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

ANALYSIS

Respondent's argument to the ALJ seemed to focus on whether the parking lot was part of respondent's premises. The ALJ agreed with respondent and found that respondent did not own or control the parking lot where claimant was injured. Therefore, claimant's accident did not occur on respondent's premises. But the ALJ went on to find that "[s]imilar to truck drivers and drug detail men, the place of [claimant's] employment itself is intentionally off the employer's premises and control. So the usual rules do not fit."[8] Without any further analysis, the ALJ found claimant's injuries to be compensable. However, neither the premises exception nor the inherent travel exception to the going and coming rule is necessary to decide the issue here. Claimant was not on her way to or leaving work, and traveling was not inherent to her job. Although respondent did not have its own office facility, claimant was not required to travel from job site to job site. Instead, she was simply on a break when she was injured. Lunch trips away from and back to the workplace are generally treated the same as travel to and from work at the beginning and end of the workday because of the length of time involved and the distance from the premises. However, short breaks are generally not treated as falling under the coming and going rule. The relevant rule that addresses accidents that occur during breaks as generally arising out of and in the course of employment is sometimes referred to as the personal comfort doctrine. As breaks are a routine part of employment that benefit both the employer and the employee, accidents that occur during a routine break are considered to be compensable. Therefore, the ALJ's finding is affirmed, although perhaps for a different reason.

But even if the Board were to apply the premises analysis to these facts, it appears that the location where claimant was injured should be considered respondent's premises. During oral argument to the Board, respondent acknowledged that it did not have its own

[8] ALJ Award (Nov. 6, 2007) at 6.

premises. Instead, its employees worked at the premises of the company it was monitoring; in the case of claimant, this was Pitney Bowes. For this reason, respondent said the premises of Pitney Bowes should be treated as respondent's premises. Claimant testified that she did not know whether Pitney Bowes owned or leased the building where she worked, but she referred to the building as the Pitney Bowes building or facility and referred to the parking lot as the Pitney Bowes employee parking lot. Neither claimant nor any other witness was asked whether there were other tenants in the building or whether the public used the parking lot. But based on the nature of these businesses, this would seem unlikely. Therefore, the Board finds the parking lot where claimant fell to be respondent's premises for purposes of the Workers Compensation Act.[9]

Turning now to the nature and extent of claimant's disability, the Board agrees with the ALJ that both Dr. Prostic and Dr. Carabetta are credible experts. The ALJ cited the incomplete history allegedly given to Dr. Carabetta as his rationale for giving more weight to the rating opinion of Dr. Prostic. However, the Board finds that both Dr. Carabetta and Dr. Prostic were given similar histories. Claimant did not tell either physician that she was still suffering from problems with her arm or elbow, and neither Dr. Prostic nor Dr. Carabetta assigned any of their respective permanent impairment ratings for the elbow injury. Accordingly, the Board finds the opinions of both physidians are entitled to be given approximately equal weight.

CONCLUSION

(1) Claimant's accident and resulting disability arose out of and in the course of her employment with respondent.

(2) Claimant has a 6.5 percent permanent impairment to her body as a whole as a result of her work-related injuries.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 6, 2007, is modified to find that claimant has a 6.5 percent permanent partial general disability.

Claimant is entitled to 26.98 weeks of permanent partial disability compensation at the rate of $483.00 per week or $13,031.34 for a 6.5 percent functional disability, making a total award of $13,031.34.

As of February 18, 2008, there would be due and owing to the claimant 26.98 weeks of permanent partial disability compensation at the rate of $483 per week in the sum of

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[9] See *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

$13,031.34 for a total due and owing of $13,031.34, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge